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[ct] Literary property in Scotland in the eighteenth and nineteenth centuries

[au]*Hector MacQueen*

## [a] 1. INTRODUCTION

Since the Statute of Anne in 1710, copyright legislation enacted in the United Kingdom has applied throughout the United Kingdom. But prior to the Copyright Act 1911 none of that legislation purported to be a complete statement of the relevant law. Issues thus arose about the relationship between the statutory provisions and the rest of the quite distinct laws respectively applying in the different jurisdictions within the United Kingdom. Unlike English law, Scots law had been much influenced by Roman or Civil law before 1710, and although after the Anglo-Scottish Union of 1707 its long-established court system became subject in civil matters to an appeal to the House of Lords in London, this alone did not change the law and its culture. The Statute of Anne was itself very largely a product of the 1707 Union, but for the remainder of the eighteenth century and into the early years of the nineteenth its accommodation with the pre-existing law presented a challenge for Scottish lawyers. This was at both practical and theoretical levels, most notably illustrated by the great case of *Hinton v Donaldson* in 1773. The challenge was further complicated by awareness of similar struggles taking place in English law, along with doubts about the solutions produced by the English courts. By the mid-nineteenth century, however, Scottish lawyers seem in general to have become much more willing to be led by the analyses and outcomes emerging from England on these questions, and any notions of a distinct approach could not survive the increasingly comprehensive legislation produced by the Westminster Parliament for the whole country.

## [a] 2. THE 1707 UNION AND THE STATUTE OF ANNE

The 1603 Union of the Crowns of England and Scotland in the person of King James VI and I left in place two separate kingdoms, each under a Crown which simply happened both to be held by the same person for the next century. But the 1707 Anglo-Scottish Union created a single united kingdom and Crown of Great Britain, a single Parliament, and the legal framework for a single market with full freedom of trade between Scotland and England. But this single market was not thought to require general unification of the distinct laws and legal systems of England and Scotland. In particular, under Article XVIII of the Union agreement Scots law itself was to ‘remain in the same force as before’, albeit ‘alterable by the Parliament of Great-Britain’. The article also sought to regulate the parliamentary power to alter Scots law: only with ‘the Laws which concern public Right, Policy, and civil Government’ might the object of the change be to make the law ‘the same throughout the whole United Kingdom’, whereas ‘no Alteration [might] be made in Laws which concern private Right, except for evident Utility of the Subjects within Scotland’.<sup>1</sup>

The Statute of Anne 1710 was an early manifestation of the power of the Parliament of Great Britain under Article XVIII. Before the 1707 Union the Scottish Privy Council provided both the granting body to which application for printing privileges was made by either publisher or author, and the forum in which disputes about the scope of the privileges

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<sup>1</sup> For discussion of the meanings of public and private right, see JD Ford, ‘The Legal Provisions in the Acts of Union’ (2007) 66 CLJ 106, 108–18; John W Cairns, ‘The Origins of the Edinburgh Law School: the Union of 1707 and the Regius Chair’ (2007) 11 Edin LR 300, 313–26.

were determined.<sup>2</sup> This system was however undermined immediately after the Union, when the Scottish Privy Council was abolished by statute from 1 May 1708.<sup>3</sup> In England there had effectively been no system since 1695.<sup>4</sup> The Statute of Anne accordingly introduced a new scheme for the whole kingdom, probably as a matter of ‘public right’ in Scotland. The Statute declared that an author or a bookseller had ‘the sole liberty’ of publishing a book for a period of 14 years from first publication, with authors (but not booksellers) being entitled to a further 14 years of exclusive right after the expiry of the initial period of protection. The Statute further provided penal monetary sanctions for infringement of these exclusive rights, half payable to the Crown and the other half to the plaintiff, so long as, prior to publication, the title to the book was registered at Stationers Hall (the headquarters of the London booksellers’ guild, near St Paul’s Cathedral). The Act thus required registration only for the enforceability of its penalties for infringement, not for the author or bookseller’s exclusive right. What was therefore left unclear was whether the Statute actually conferred this exclusivity, or rather merely recognized and then in some respects confined it. Scottish distinctiveness was provided for in the Statute: in particular, the Court of Session was given jurisdiction ‘if any person or persons incur the penalties contained in this Act, in that part of Great Britain called Scotland’.

### [a] 3. PLACING LITERARY PROPERTY IN THE FRAMEWORK OF SCOTS LAW

As literary property grew in practical significance in the first half of the eighteenth century, so writers on Scots law were compelled to put these rights within the general structures of their expositions. These were of course usually based on Civilian systematics, while copyright was generally yoked together with patents.<sup>5</sup> In 1751 Andrew McDouall (soon to go on the bench as Lord Bankton) placed a brief discussion of the two rights in his chapter on ‘Permutation and Sale’, referring to them as ‘exclusive privileges’ limiting the general freedom of commerce along with rules privileging markets and fairs and criminal provisions on selling of counterfeit drink and the use of false weights and measures. He also noted that grants to ‘the inventors of new manufactures, or authors of books, securing to them the sole benefit of the same’, did not fall foul of the common law’s prohibition on monopolies, being ‘in vertue of statute’ (presumably the Statute of Monopolies and the Statute of Anne respectively, although Bankton does not name them specifically) and ‘limited to a certain period of years, after which they determine’.<sup>6</sup> His judicial colleague Henry Home, Lord Kames likewise treated patents and copyright as an aspect of the regulation of commerce in his *Principles of Equity*, first published in 1760,<sup>7</sup> observing that the only lawful monopolies were those granted for the public good. Patents for inventions and copyright for books, ‘limited to a time certain’, were examples: ‘the profit made in that period is a spur to invention: people are not hurt by such a monopoly, being deprived of no privilege enjoyed by

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<sup>2</sup> See generally Alastair Mann’s contribution to this volume in Chapter 6.

<sup>3</sup> Union with Scotland (Amendment) Act 1707, s 1 (6 Anne c 40).

<sup>4</sup> Ronan Deazley, *On the Origin of the Right to Copy* (Hart Publishing 2004) ch 1.

<sup>5</sup> On Scots patent law, see Hector MacQueen, ‘Intellectual Property and the Common Law in Scotland c1700–c1850’ in Catherine W Ng, Lionel Bently and Giuseppina D’Agostino (eds), *The Common Law of Intellectual Property: Essays in Honour of Professor David Vaver* (Hart Publishing 2010) 21.

<sup>6</sup> Andrew McDouall Lord Bankton, *An Institute of the Laws of Scotland* (1751–53) bk I, tit xix, s 11. I have used the three-volume facsimile reprint produced by the Stair Society, vols 41–43, between 1993 and 1995.

<sup>7</sup> Henry Home, Lord Kames, *Principles of Equity* (3rd edn, Edinburgh 1778) vol 2, bk II, s 3. There are at least three modern reprints of this edition. See Hector MacQueen, ‘The War of the Booksellers: Natural Law, Equity and Literary Property in Eighteenth-Century Scotland’ (2014) 35 J Legal Hist 231, 239 fn 37.

them before the monopoly took place; and after expiry of the time limited, all are benefited without distinction.’<sup>8</sup>

Later writers discussed copyright and patents, not in conjunction with market regulation, but rather as part of the law of real rights, or property (using that word in a very broad generic sense).<sup>9</sup> The concept of ‘exclusive privilege’, mentioned by Bankton, began to develop as a form of real right.<sup>10</sup> Lecturing on jurisprudence at Glasgow University in the 1760s, Adam Smith analyzed the four real rights of the Civil Law (Property [ie, in its more precise meaning of Ownership], Servitude, Pledge and Inheritance), and argued that the last of these could only be considered as a distinct real right in the context where the heir was preparing to take up his right following the death of the previous proprietor, since his privilege to inherit excluded the right of any others who would be heirs after him. On this analogy, ‘all other exclusive privileges have the same title, and appear evidently as well as it to be real rights’.<sup>11</sup> Some exclusive privileges, such as inheritance, were founded on natural reason, but ‘the greatest part . . . are the creatures of the civil constitutions of the country’; and amongst them were to be placed patents for inventions and copyright.<sup>12</sup>

David Hume, Professor of Scots Law at Edinburgh 1786–1822, in his lectures likewise categorized copyright and patents as ‘instances of the real right of Exclusive Privilege’, which he seems to have conceived of as an ‘exclusive title . . . to perform a certain operation . . . for and within a certain territory of land, and to draw the profit attached to that operation’. Any other person presuming to perform the operation was guilty of ‘usurpation . . . infringement of the exclusive privilege’, and the holder was entitled to vindication, meaning that the right was ‘thus marked with all the characters of a proper legitimate and real right’.<sup>13</sup> Other examples included the trading monopolies and privileges of royal burghs, merchant guilds and craft incorporations.

George Joseph Bell, Hume’s successor in the Edinburgh Chair from 1822 to 1837, also treated copyrights and patents as real rights, or as ‘estates available to creditors’,<sup>14</sup> but more or less abandoned the concept of ‘exclusive privilege’ in favour of seeing the rights as property, albeit in a somewhat opaque passage suggesting that the right of ownership was less than full-blown:

[quotation] The right to enjoy the benefit of a useful invention, or literary composition, seems to rest securely on the great foundation on which property depends; namely, occupancy, with skill, labour, expense and intellectual exertion, employed in the acquisition of production. But a more narrow view has been taken of this matter, and instead of considering the invention or the composition as itself the subject of property, it has been held that, as the purchase of the individual machine, or book gives the power of imitating or of copying it, either such copy or the original may be sold, and so copies multiplied to make gain. With this view, in the case of discoveries in the useful arts, concurs the interest which the public has to prevent the

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<sup>8</sup> Kames (n 7) vol 2, 99.

<sup>9</sup> For the doctrine of real rights in Scots law at this time, see Baron David Hume, *Lectures 1786–1822* (Stair Society, 1939–58) vol 2, 2–3.

<sup>10</sup> See further Gillian Black, ‘Exclusive Privilege: Adam Smith, John Millar, and the Creation of a New Right’ in Ross G Anderson, James Chalmers and John MacLeod (eds), *Glasgow Tercentenary Essays: 300 Years of the School of Law* (Avizandum 2014) 20–52.

<sup>11</sup> Adam Smith, *Lectures on Jurisprudence* (OUP 1979) 82.

<sup>12</sup> *ibid* 82–83.

<sup>13</sup> Hume (n 9) vol 4, 38.

<sup>14</sup> GJ Bell, *Commentaries on the Mercantile Jurisprudence of Scotland* (7th edn 1870) vol 1, 103. The 7th edition has been used, since it reprints the text of the 5th edition of 1835, the last produced by Bell himself. The work first began to be published in 1800.

undue raising of prices, and restraining of industry and improvement, according to the caprice or self-interest of monopolists. The Legislature has therefore interposed, on the one hand to secure for a certain but limited time, to the authors of useful inventions, or of literary compositions, a monopoly of sale and profit; and on the other to protect the interests of the public.<sup>15</sup>[/quotation]

The *inter vivos* transferability of patents and copyrights was also a significant point of difference from many of the other forms of exclusive privilege mentioned by Smith and Hume. Hume and Bell both clearly, and without much discussion, also considered patents and copyrights to be incorporeal rights. Hume raised, without answering, the question of whether the rights were to be considered as heritable rather than moveable rights;<sup>16</sup> ie, as rights that on death passed to the holder's heir-at-law rather than to that part of the deceased's estate administered by executors which could be bequeathed by will. In 1832 John Shank More, an advocate later to be Bell's successor in the Scots Law Chair at Edinburgh, argued that the rights were heritable,<sup>17</sup> his approach being based on the heritability of rights (such as pensions and annuities) with a tract of future time—'rights of such a nature that they cannot be at once paid or fulfilled by the debtor, but continue for a number of years, and carry a yearly profit to the creditor while they subsist, without any relation to any capital sum or stock'<sup>18</sup>—and the fit between this definition and patents and copyrights. Bell appeared to accept the analogy in his *Commentaries*.<sup>19</sup> But the analysis was not consistently maintained throughout his writings, for his *Principles* brought the substantive treatment of the rights under the general heading 'Property in moveables' and a further sub-heading 'Of incorporeal moveable subjects'. The debate ended when copyrights were declared to be moveable property by the Copyright Act 1842.<sup>20</sup>

#### [a] 4. LITERARY PROPERTY AND EQUITABLE REMEDIES IN SCOTLAND

A requirement of registration far away in London might have made life more difficult for Scottish publishers and authors, but in practice Scottish publications seem to have been frequently entered in the register at Stationers Hall throughout the eighteenth century. The barrier of distance was thus not insuperable for Scots, at least for those with resources and good prospects of literary success.<sup>21</sup> In the mid-eighteenth century, however, London and Scottish booksellers fell into conflict over a number of issues about literary property. The conflict has become known as 'The Battle of the Booksellers'; but in some ways it was more like a war, lasting for over 30 years and involving not just court battles but other forms of struggle.<sup>22</sup>

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<sup>15</sup> GJ Bell, *Principles of the Law of Scotland* (1st edn 1829; 4th edn (the last produced by Bell) 1839) s 1348. Bell's *Commentaries* refers to the 'exclusive privilege of patent or copyright' in a sub-heading. Bell, *Commentaries* (n 14) 120. Bell's *Principles* reached a 10th and final edition in 1900.

<sup>16</sup> Hume (n 9) vol 4, 565.

<sup>17</sup> JS More, *Notes on Stair* (1832) cxli (Note R(4)).

<sup>18</sup> The definition of John Erskine, *An Institute of the Law of Scotland* (many editions 1773–1871) bk II, tit ii, s 6. I have used the facsimile reprint of the first edition produced by the Edinburgh Legal Education Trust (2014).

<sup>19</sup> Bell, *Commentaries* (n 14) vol 1, 110–11. See also his *Principles*. Bell, *Principles* (n 15) s 1480.

<sup>20</sup> Section 25.

<sup>21</sup> Alastair Mann, *The Scottish Book Trade 1500–1720* (Tuckwell 2000) 123–24; RB Sher, *The Enlightenment and the Book: Scottish Authors and their Publishers in Eighteenth-Century Britain, Ireland, and America* (Chicago UP 2006) 243–44; Warren McDougall, 'Copyright Litigation in the Court of Session, 1738–1749, and the Rise of the Scottish Book Trade' (1987) 5 *Edin Bibliographical Society Transactions* 2, 26–29.

<sup>22</sup> But McDougall, 'Copyright Litigation' (n 21) 22–29, highlights the considerable degree of business co-operation that also existed between the Scottish and the London booksellers. See further Sher, *Enlightenment and the Book* (n 21) 265–326.

The issues arose from the making and sale in Scotland by its booksellers of cheap reprints of works with subsisting registrations in Stationers Hall, along with the export of these reprints to England and, indeed, to North America and Continental Europe.<sup>23</sup> The London booksellers first began to take legal action against such reprints in the late 1730s.<sup>24</sup> The initial question to be debated in the campaign was whether the Statute's very limited sanctions against infringement—forfeiture of the infringing publications and payment of one penny for every infringing sheet, with only half the money going to the person suing—could be supplemented by other remedies available generally from the courts. After some equivocation, the answer given to this question by the Court of Session differed fundamentally from that of the English judiciary.

Well before 1740, the Court of Chancery in England decided that, provided the party bringing the action first waived his claim to the penalties provided by the Statute of Anne, it could grant the equitable remedies of injunctions (orders prohibiting the continuation of infringing activities) and requiring infringers to hand their profits over to the right-holders by way of damages.<sup>25</sup> The basis of Chancery's jurisdiction in these cases received little discussion although it was suggested that at least an accounting of profits was implicitly authorized by the Statute of Anne or a natural incident of granting injunctive relief.<sup>26</sup> The London booksellers certainly saw far greater practical utility in the equitable remedies of the injunction and account of profits than in those provided by the Statute, and neither defendants nor the Chancery judges chose to place too many doctrinal difficulties in their path.

The Scottish judges, on the other hand, after some wavering, ultimately refused in 1748 to allow the supplementation of the Statute of Anne in this way in *Midwinter v Hamilton*.<sup>27</sup> The case, which began in 1743, involved a number of leading London booksellers (including Daniel Midwinter but with the group actually being led by Andrew Millar), as well as an even larger number of Edinburgh and Glasgow booksellers (including Gavin Hamilton amongst other prominent names<sup>28</sup>). The London booksellers' claim was for the penalties in the Statute of Anne plus damages and an accounting of profits, with the latter remedies being justified on the basis that the statutory ones 'were being found attended with such Difficulties, that in no one instance . . . have the same ever been prosecuted or recovered'.<sup>29</sup> Although the pleadings made reference to Chancery's use of the equitable remedy of the injunction, at this stage the Court of Session does not seem to have much developed what would become its equivalent remedy of 'suspension and interdict' as a preventative measure against prospective or ongoing wrongdoing of all kinds. While the remedy of suspension was long established, it had hitherto been largely confined to preventing the enforcement of wrongfully obtained court decrees.<sup>30</sup> It may be no more than

<sup>23</sup> See McDougall, 'Copyright Litigation' (n 21) 14–22, on the overseas markets into which Scottish booksellers were making inroads by the 1740s, including imports as well as exports. See further on the US market later in the eighteenth century Sher, *Enlightenment and the Book* (n 21) chs 8 and 9.

<sup>24</sup> See McDougall, 'Copyright Litigation' (n 21) 2–9.

<sup>25</sup> See Deazley, *Right to Copy* (n 4) 57–69, 137–38.

<sup>26</sup> See Tomás Gómez-Arostegui's contribution to this volume at Chapter 11. See also Deazley, *Right to Copy* (n 4) 61–62, 64–65; H Tomás Gómez-Arostegui, 'What History Teaches us About Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement' (2008) 81 S Cal L Rev 1197, 1233.

<sup>27</sup> *Midwinter v Hamilton* (1748) Mor 8295; McDougall, 'Copyright Litigation' (n 21) 5–8; RS Tompson, 'Scottish Judges and the Birth of British Copyright' (1992) Jur Rev 18, 19–22; M Rose, *Authors and Owners: The Invention of Copyright* (HUP 1993) 69–71; Deazley, *Right to Copy* (n 4) 116–32. Note also Bankton, *Institute* (n 6) bk I, tit xix, s 12.

<sup>28</sup> On Hamilton, see Warren McDougall, 'Hamilton, Gavin (1704–1767)', ODNB, <<http://www.oxforddnb.com/view/article/65019>>.

<sup>29</sup> Information for Daniel Midwinter, 30 November 1744, quoted Deazley, *Right to Copy* (n 4) 117.

<sup>30</sup> See eg James Dalrymple, Viscount Stair, *Institutions of the Law of Scotland* (many editions, 1681–1981) bk IV, 52 (I have used the 6th and latest edition by DM Walker for EUP); W Forbes, *Institutes of the Law of*

coincidence that not long after *Midwinter v Hamilton* Lord Bankton declared in his *Institute* that ‘. . . the Court of Session puts a stop to the unwarrantable encroachments upon any man’s property or possession, by suspending the operation till the matter be cognosced’.<sup>31</sup> This certainly pointed to a means of preventing infringing activity in relation to literary property rights.

An appeal to the House of Lords against the Court of Session’s refusal to grant the London booksellers a remedy in *Midwinter v Hamilton* failed in 1751, not by upholding the court below, but through a technical finding that the action ‘was improperly and inconsistently brought’. The appellant booksellers had illegitimately cumulated non-statutory with statutory remedies (recall here that in Chancery the plaintiff had to waive the statutory penalties in order to gain the protection of the court), as well as suing several defenders in one action when the points at issue against each were about separate and distinct books and rights therein. The case was remitted back to the Court of Session, but no further litigation ensued there.<sup>32</sup>

The pleadings for the London booksellers in *Midwinter v Hamilton* noted that ‘the Court of Session in Scotland [is] a mixt Jurisdiction of Law and Equity’.<sup>33</sup> There was no formal division of legal and equitable jurisdictions in Scotland, but this did not disable the court from fashioning a remedy to meet a situation where otherwise injustice might result from the strict application of the law. That the Court of Session administered law and equity together in its procedures was well established, and no doubt the London booksellers sought to invoke that power. This may also explain, at least in part, the waverings of the court before it reached its final decision. Towards the end of the seventeenth century, the position, and its limits, had been explained by the institutional writer Viscount Stair (in his time Lord President of the Court of Session) in terms of the *nobile officium* of a superior or sovereign court in contrast with the mere *officium ordinarium* (or *mercenarium*) of the inferior courts:

[quotation]. . . [I]n new cases, there is necessity of new cures, which must be supplied by the Lords, who are authorized for that effect by the institution of the College of Justice. . . . [I]n many cases, it is necessary wherein they may have recourse from strict law to equity, even in the matter of judgment; and in more cases they may recede from the ordinary form and manner of probation, whereof there are many instances commonly known.<sup>34</sup>[/quotation]

Stair acknowledged that matters were differently arranged in England, with the courts of common law disabled from the administration of equity by the existence of a distinct court for the purpose. But England was exceptional: ‘Other nations do not divide the jurisdiction of their courts, but supply the cases of equity and conscience, by the noble office of their supreme ordinary courts, as we do.’<sup>35</sup> Passages similar to these remarks of Stair can be found in later institutional writings, especially those of Bankton and John Erskine (Professor of

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*Scotland* (1722–30, facsimile reprint Edinburgh Legal Education Trust, 2012) 445–46; and the cases reported in WM Morison, *The decisions of the Court of Session, from its institution until the separation of the Court into two divisions in the year 1808, digested under proper heads, in the form of a dictionary* (1801–11), sv ‘Suspension’.

<sup>31</sup> Bankton, *Institute* (n 6) bk IV, tit 38, s 20.

<sup>32</sup> *Midwinter v Kincaid* (1751) 1 Pat App 488; see further Rose, *Authors and Owners* (n 27) 70–71; Deazley, *Right to Copy* (n 4) 130–32.

<sup>33</sup> The pleadings in *Midwinter v Hamilton* are here quoted from Deazley, *Right to Copy* (n 4) 117.

<sup>34</sup> Stair, *Institutions* (n 30) bk IV, tit iii, s 1.

<sup>35</sup> *ibid.*

Scots Law at Edinburgh University 1737–65), both of whom wrote during the course of events between *Midwinter v Hamilton* and *Hinton v Donaldson*.<sup>36</sup>

Why did the Court of Session not follow the example of the Court of Chancery when it clearly had the power to do so and when, perhaps, there might have been thought to be, in Stair's language, a 'necessity for new cures' to meet a new case? At least one reason was the far more vigorous debate on the matter in the Scottish compared to the English court. Proceedings in Edinburgh lasted for five years. Among counsel for the Scottish booksellers was the formidable Henry Home, later Lord Kames, a leading figure in the Scottish Enlightenment. His arguments in *Midwinter* seem essentially to have been, first, that the pursuers' right depended entirely upon the Statute of Anne, not on any pre-existing right, and could not be extended beyond what the legislation laid down; second, that the statutory right was at best analogous with property; and, third, consequentialist or *reductio ad absurdum* reasoning that if authors had rights beyond the Statute, why should this not also apply to inventors who had not taken out letters patent?<sup>37</sup>

Kames referred to his past triumph at the bar in his *Principles of Equity*, implicitly criticizing the handling of the Statute of Anne by the English equity courts when he argued that 'monopolies or personal privileges cannot be extended by a court of equity; because that court may prevent mischief, but has no power to do any act for enriching any person, or making him *locupletior*, as termed in the Roman law.'<sup>38</sup> The context in which Kames made his criticism was a discussion of the court's equitable powers in relation to statutes 'preventative of wrong or mischief'. He distinguished between such statutes and those directed to the 'positive good of the whole society, or of some part', in that with the latter the court had no power to 'supply' answers to any defects in them: 'it belongs to the legislature only to make laws or regulations for promoting good positively'.<sup>39</sup> The Statute of Anne was clearly such a piece of legislation in Kames' view. In another chapter on the '[p]owers of a court of equity to remedy what is imperfect in common law with respect to statutes', he drew another distinction, between statutes prohibiting 'noxious evils' absolutely (which courts might use all means within their powers to enforce as well as the statutory penalty), and those regarding 'slighter evils, to repress which no other means are intended to be applied but a pecuniary penalty only'.<sup>40</sup> The Statute of Anne, he said, plainly belonged in this second class.<sup>41</sup>

The significance of Kames' remark about Chancery's role in the copyright debate is thus that, while in general he favoured the expansion of the equitable aspects of the Court of Session's jurisdiction, he also thought that equity should operate within certain limits. Equity was not simply a matter of doing justice between individuals coming before the court; it needed to be reduced to a rational system of rules as far as possible without, however, depriving it of its flexibility and responsiveness to injustice. Above all, perhaps, equity had to yield to utility, or the greater good of society as a whole.<sup>42</sup>

After their disappointment in *Midwinter v Hamilton*, the London booksellers seem to have abandoned the tactic of suing in Scotland, choosing rather to mount actions in the

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<sup>36</sup> Bankton, *Institute* (n 6) bk IV, tit vii, ss 23–28; Erskine, *Institute* (n 18) bk I, tit iii, s 22. Note also Forbes, *Institutes* (n 30) 420.

<sup>37</sup> See Deazley, *Right to Copy* (n 4) 117–18, 120–22, 125–27, for Home's arguments.

<sup>38</sup> Henry Home, Lord Kames, *Principles of Equity* (Edinburgh 1760) 185. This statement, or something close to it, reappears in subsequent editions. See Henry Home, Lord Kames, *Principles of Equity* (2nd edn, Edinburgh 1767) 265–66; Kames (n 7) vol 2, 126.

<sup>39</sup> Kames (n 7) vol 2, 116.

<sup>40</sup> *ibid* vol 1, 339, 350.

<sup>41</sup> *ibid* vol 1, 350.

<sup>42</sup> On Kames' approach to equity, see A Rahmatian, *Lord Kames: Legal and Social Theorist* (EUP 2015), chapter VIII and literature there cited.



English courts against those English provincial booksellers who also sold the cheap Scottish reprints.<sup>43</sup> There was however something of a revival of litigation in Scotland in the later 1760s. In August 1767 John Almon, a London bookseller, published a summary of the speeches of the Lords of Session in a notorious cause of the time, with an introductory preface by a barrister at law. Subsequently two editions of this book were re-published in Edinburgh, one by Messrs Robertson and Ruddiman, the other by Robert Fleming. Almon presented a petition to the sheriff of Edinburgh ‘to prohibit the sale of these editions and to grant warrants for searching the houses, warehouses, and shops of the defendants, that none of the copies on hand, or in the possession of the defendants, might be sold’.<sup>44</sup> The sheriff granted the orders sought: ‘the defendants afterwards came before the Court of Session, where Mr Almon met them with actions, &c. At length, the sale of both prohibitions being entirely prohibited, the matter was allowed to drop, the defendants paying all expenses.’<sup>45</sup> The case provides a striking example of an inferior court granting what was in effect an interdict with discovery attached, with the process apparently being approved by the Court of Session. It seems too that the court’s power to compel a defender to ‘cease and desist’ from wrongful activity in general, and not just the enforcement of wrongly granted court orders, had become much more fully accepted than quarter of a century before. Erskine observed that ‘suspension is a process authorised by law for putting a stop, not only to execution of iniquitous decrees, but to all encroachments either on property or possession, and in general to every unlawful proceeding.’<sup>46</sup> This final phrase extended the remedy even further than Bankton’s protection against encroachments upon property or possession 20 years before.

[a] 5. *HINTON v DONALDSON* (1773)

On 27 July 1773 the Court of Session in Edinburgh decided the case of *Hinton v Donaldson and others*.<sup>47</sup> It was about *The New History of the Holy Bible*, a well-known and popular book by the Reverend Thomas Stackhouse (1681/2–1752) first published in London and registered at Stationers Hall in 1733. Although the statutory term had therefore expired in 1761, the pursuer, John Hinton, a highly successful and prominent bookseller based in London, claimed continuing, common law, rights in the book.<sup>48</sup> Stackhouse had sold the rights in his *History* to the publisher, Stephen Austen, in 1740. Austen died in 1750, bequeathing the rights to his widow, Elizabeth;<sup>49</sup> and her subsequent marriage with Hinton transferred them to him. The defenders—Alexander Donaldson, John Wood and James Meurose—were all Scottish booksellers, based in Edinburgh or (in the case of Meurose) Kilmarnock. Donaldson was the major figure amongst them: commercially active in London as well as Edinburgh in

<sup>43</sup> McDougall, ‘Copyright Litigation’ (n 21) 9; John Feather, *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain* (London 1994) 83.

<sup>44</sup> Anon, *Memoirs of a Late Eminent Bookseller* (1790) 52.

<sup>45</sup> *ibid* 52–53. I owe this reference to Tomás Gómez-Arostegui. Note also RC Cole (ed), *The General Correspondence of James Boswell 1766–1769*, 2 vols (EUP and Yale UP, 1993–97) vol 1, 192, 197–98, 201, 235, vol 2, 7 fn 7.

<sup>46</sup> Erskine, *Institute* (n 18) bk IV, tit iii, s 20.

<sup>47</sup> *Hinton v Donaldson* (1773) Mor 8307; more fully at 5 Br Supp 508. The bundle of papers forming the process in the case is held in the National Records of Scotland (NRS), call number CS 231/H/2/4.

<sup>48</sup> John Raven, *The Business of Books: Booksellers and the English Book Trade 1450–1850* (Yale UP 2007) 190, 217.

<sup>49</sup> Austen’s will is available online from The National Archives, Kew: see <<http://discovery.nationalarchives.gov.uk/SearchUI/Details?uri=D537815>>. An extract copy is included in the bundle of papers forming the process in *Hinton v Donaldson* (n 47).

reprinting works whose registration at Stationer's Hall had expired, and a vigorous critic and competitor of the London booksellers.<sup>50</sup>

Hinton claimed that the defenders had each printed, published and sold editions of Stackhouse's *History* without his permission, so infringing his exclusive common law rights. The remedies he sought were, first, an order against the defenders 'to cease and desist from all further, printing, publishing or selling' of the Stackhouse book; second, delivery up of the already printed but unsold copies (amounting, it was claimed, to some 10,000 in number); third, a sum of £1-10/- for each copy sold and each copy less than the 10,000 of which delivery up was sought; and damages for the invasion of the pursuer's property. But, in a bold decision, nine out of ten Court of Session judges altogether held that literary property, or copyright, had no existence in relation to published works except under the Statute of Anne and that, accordingly, Hinton had no remedy. There was no such thing as copyright at common law in Scotland. The court refused to follow *Millar v Taylor*, the contrary decision handed down for England in 1769 by the Court of King's Bench.<sup>51</sup> Since the pursuer had no rights, there was no need to discuss the competence of the remedies he sought, or to make comparisons with the English position. Seven months later, this Scottish decision was instrumental in persuading the House of Lords in *Donaldson v Becket*, decided on 22 February 1774, to overturn the previous English approach.<sup>52</sup> Alexander Donaldson was also to the fore in this second case, first as losing defendant and then as triumphant appellant.

*Hinton v Donaldson* had begun in the Outer House in July 1771.<sup>53</sup> Thereafter counsel on each side submitted printed 'informations' dated 2 January 1773 which appeared on the Inner House rolls on 12 January.<sup>54</sup> Meantime, during 1772 a number of other Court of Session actions were raised by London booksellers against Edinburgh counterparts in respect of various alleged infringements of the Statute of Anne.<sup>55</sup> In London, the Court of Chancery granted a perpetual injunction in *Becket v Donaldson* in November 1772, with Donaldson lodging his appeal to the House of Lords the following month.<sup>56</sup>

The oral debate on the written pleadings in *Hinton v Donaldson* began before 11 of the 13 Inner House judges on Tuesday 20 July 1773, and lasted for the rest of the week. The parties were represented by some of the cream of the contemporary Scottish bar. Three counsel spoke on each side. All of Hinton's advocates would later go on to the Court of

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<sup>50</sup> For Donaldson's career see JJ Caudle and RB Sher, 'Donaldson, Alexander (bap. 1727, d. 1794)', ODNB, <<http://www.oxforddnb.com/view/article/64278>>. See eg, his pamphlet, *Some Thoughts on the State of Literary Property, Humbly Submitted to the Consideration of the Public* (1764). Note also A Donaldson, 'Petition', in *Petitions and Papers Relating to the Bill of the Booksellers now before the House of Commons* (1774) 10.

<sup>51</sup> *Millar v Taylor* (1769) 4 Burr 2303.

<sup>52</sup> *Donaldson v Becket* (1774) 4 Burr 2408, 2 Bro PC 129. See further H Tomás Gómez-Arostegui, 'Copyright at Common Law in 1774' (2014) 47 Conn L Rev 1.

<sup>53</sup> The procedure can be followed through the bundle of papers in the process preserved in the National Records of Scotland (above, note 47). See further MacQueen 'War of the Booksellers' (n 7) 243–244.

<sup>54</sup> The 'informations' in this and other cases are now held in the collections of Session Papers in the Advocates Library (ALSP) and the Signet Library (SLSP). See further Angus Stewart QC 'The Session Papers in the Advocates Library' in Hector L MacQueen (ed) *Miscellany Four* (Stair Society vol 49, 2002) 199. For Session Papers in *Hinton v Donaldson* see ALSP, Pitfour Collection, vol 54, no 9, Arniston Collection, vol 3, no 17, and Campbell Collection, vol 23, nos 8–9; SLSP, vols 176 (no 2), 347 (no 1a), and 591 (no 16). The informations in *Hinton v Donaldson* are reprinted as items B and D in S Pratt (ed), *The Literary Property Debate: Six Tracts, 1764–1774* (Garland 1974).

<sup>55</sup> Deazley, *Right to Copy* (n 4) 180–82. The processes can be found in the NRS, call numbers CS237/D/3/12 (*Edward Dilly and Charles Dilly and attorney v Gordon*, 1772); CS237/D/3/15/1 (*Edward Dilly and Charles Dilly and attorney v Anderson*, 1772); CS237/D/3/15/2 (*Donald White and Company v Donald*, 1772, but no process now, ie, wanting —see CS237/MISC/1/34 however); CS237/G/2/31 (*William Griffin and attorney v McPherson*, 1772); CS229/IJ/1/55 (*William Johnston and attorney v Robertson and others*, 1772). See also CS16/1/152 and 154 (Manuscript General Minute Book, Court of Session, for Jun 1772–Jul 1773, 2 vols).

<sup>56</sup> Deazley, *Right to Copy* (n 4) 191–92.

Session bench.<sup>57</sup> Alexander Donaldson and his colleagues were represented by John MacLaurin (later raised to the bench as Lord Dreghorn), a future Lord President in Ilay Campbell, and James Boswell (never a judge, but already well known as an author himself, albeit only later famous as biographer, diarist and letter-writer). More importantly in the context of 1773, Boswell and MacLaurin were friends of Donaldson and he had previously published works by both men. While with Boswell the publication was of poetry rather than law, MacLaurin was the author of a pamphlet first produced by Donaldson in 1767, entitled *Considerations on the Origin and Nature of Literary Property, wherein that species of property is clearly proved to subsist for no longer than the terms fixed by the statute 8vo Anne*. This may perhaps have been in anticipation of or a response to the Almon case in Edinburgh Sheriff Court the same year. The title manifests the pamphlet's support for Donaldson's position on literary property.<sup>58</sup> It was reprinted in 1768 along with an appendix containing 'a letter to Robert Taylor, bookseller, in Berwick', Taylor being also the printer on this occasion. He was further the defendant in the crucial English case of *Millar v Taylor*, which would not be decided until 20 April 1769. Donaldson's immediate response to *Millar v Taylor*, another pamphlet dated 8 May 1769 which argued once more the case against any literary property beyond the Statute of Anne, and was very likely produced with the assistance of MacLaurin and, perhaps, other friends of Donaldson at the Scottish bar.<sup>59</sup>

Ilay Campbell, the author of the closely reasoned written informations for the Donaldson side, had, rather remarkably, already appeared for Hinton on the other side when the case was in the Outer House in 1771. Then he had been responsible for the written answers to a memorial of preliminary points for Donaldson. But later in 1771 Campbell wrote another information, this time for an Edinburgh printer defending an action brought against him for unauthorized republication of a book, *The Rudiments of the Latin Tongue*. It had never been registered at Stationers Hall despite a patent for its printing having been obtained in 1756 by the author (the Jacobite Latinist Thomas Ruddiman, who was himself a printer as well as librarian of the Advocates Library 1730–52).<sup>60</sup> The patent had expired by the time of the action, which was accordingly based on a common law right of literary property. The apparent change of mind involved in Campbell's arguing against the common law right in the Ruddiman case may have prompted his subsequent switch to Donaldson's side.<sup>61</sup> It is not known, unfortunately, how this case was finally decided; perhaps it, and the other actions raised by the London booksellers in the course of 1772, were sisted (suspended) to await the outcome in *Hinton v Donaldson*.

We have for the eighteenth century an unusually large amount of detail about the judges' opinions in *Hinton v Donaldson* primarily because James Boswell took the trouble to gather and publish them in full text in a booklet of not quite 40 pages. There may have been an unanticipated delay in publication because Boswell spent the period between mid-August

<sup>57</sup> MacQueen, 'War of the Booksellers' (n 7) 245–46.

<sup>58</sup> In an unreported case of 1788 Lord Dreghorn refused interdict against piracy of a published account of a sensational trial which had, however, not been registered at Stationers Hall. See John P Grant, 'Pronounced for Doom: Deacon William Brodie' in John P Grant and Elaine E Sutherland (eds), *Pronounced for Doom: Early Scots Law Tales* (Avizandum 2013) 2 fn 1.

<sup>59</sup> *A Letter from a Gentleman in Edinburgh, to his Friend in London; concerning Literary Property* (1769). The pamphlet is signed by 'A Reader of Books' but is generally attributed to Donaldson.

<sup>60</sup> ALSP, Arniston Collection, vol 3, no 16. See further AP Woolrich, 'Ruddiman, Thomas (1674–1757)', ODNB <<http://www.oxforddnb.com/view/article/24249>>. The case also raises the intriguing question of how many other such individual printing patents were still being granted in favour of works not registered at Stationers Hall.

<sup>61</sup> The information written by Campbell in the Ruddiman case and that for the pursuer (written by David Rae, making the same arguments as he would later make for the pursuer in *Hinton v Donaldson*) can be found in ALSP, Arniston Collection, vol 3, no 16.

and late October 1773 on tour in the post-Culloden Highlands and Islands of Scotland with Dr Samuel Johnson. The case report eventually appeared early in 1774, ‘printed by James Donaldson, for Alexander Donaldson, and sold at his Shop, No 48 St Paul’s Churchyard, London, and Edinburgh; and by all the Booksellers in Scotland’. Thus, despite the delay, the publication was not simply the product of a successful advocate’s vanity. It was clearly part of Donaldson’s preparation for his appeal to the House of Lords in *Donaldson v Becket*, providing material that could be laid before the court to show the Scottish judges’ reasoning on the general question to be determined.<sup>62</sup> The accuracy of Boswell’s record can be confirmed from other contemporary notes of the judges’ opinions taken by Ilay Campbell and one of the judges (Lord Hailes).<sup>63</sup>

These materials all show that much in the judges’ arguments flowed from the powerful Civilian influence on Scottish legal thinking. For the Scots lawyer the ‘common law’ was closely linked to European ideas of the *ius commune* as the *ius gentium*, Roman law and, ultimately, the *ius naturale*. Natural law was not something separate from, but was rather the foundation of Scots law. Its content was to be determined by looking at what men in general understood and accepted as well as the laws of other peoples and nations—the *ius gentium*. For this purpose the law of England could of course be considered, but if that law was the only system to recognize a right of literary property outside statutory provision or the grant of a special privilege, then it was not very powerful support for the existence of such a right in Scots law. Certainly the mere fact that the English courts had held that such a right existed was not decisive for the Scottish courts. The absence of any previous reference to such a right in Roman or Scots law was also evidence that it was not a natural right, readily comprehended by all.<sup>64</sup>

The judges were probably also influenced by restrictive notions of the role of equity in Scots law. In the later seventeenth century Stair had argued in Aristotlean mode that equity, in the sense of the equality of persons, was part of the law of nature and thus informed the whole of the law, rather than being only a means of moderating the rigour of strict law.<sup>65</sup> Hence equity, ‘as the first and universal law’, was the recourse when other more formal sources—ancient custom, statutes and recent custom in the practice of the court—ran out. This was tempered, however, by ‘expediency, whereby laws are drawn in consequence *ad similes casus*’.<sup>66</sup> The writers of the eighteenth century modified Stair’s bold approach significantly, especially in relation to the equitable extension of statute.<sup>67</sup> We have already noted Kames’ argument on this point in *Principles of Equity*, directly addressing the interpretation of the Statute of Anne.<sup>68</sup> Bankton stated that only the legislature itself had the power to moderate the rigour of a statute with considerations of equity,<sup>69</sup> while Erskine thought ‘correctory’ statutes fell to be strictly interpreted<sup>70</sup> and added, in a passage clearly applicable to the Statute of Anne:

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<sup>62</sup> Tompson, ‘Scottish Judges’ (n 27) 29; Rose, *Authors and Owners* (n 27) 95–96.

<sup>63</sup> See Sir David Dalrymple, Lord Hailes, *Decisions of the Lords of Council and Session from 1766 to 1791, selected from the original MSS by M P Brown, Esq, Advocate*, 2 vols (1826) vol 1, 535–43. The notes taken by Ilay Campbell as the judges delivered their opinions can be found on the covers of the informations at ALSP, Campbell Collection (ie, his own collection of Session Papers), vol 2, 3, nos 8–9.

<sup>64</sup> MacQueen, ‘War of the Booksellers’ (n 7) 249.

<sup>65</sup> Stair, *Institutions* (n 30) bk I, tit i, s 6.

<sup>66</sup> *ibid* bk I, tit i, ss 15 & 16.

<sup>67</sup> See for the dilution of Stair’s ideas Forbes, *Institutes* (n 30), Preliminary Dissertation concerning Law in General and the Several Kinds of it; Bankton, *Institute* (n 6) bk I, tit 1; Erskine, *Institute* (n 18) bk I, tit 1.

<sup>68</sup> See above text accompanying notes 37–42.

<sup>69</sup> Bankton, *Institute* (n 6) bk I, tit 1, s 64.

<sup>70</sup> Erskine, *Institute* (n 18) bk I, tit 1, s 53.

[quotation]Laws which carry a dispensation or privilege to particular persons or societies receive a strict interpretation; because, though they are profitable to the grantee, they derogate from the general law, and most commonly imply a burden upon the rest of the community; for which reason they reach no further than to the person or society privileged.<sup>71</sup>[/quotation]

While neither pleadings nor judgments in *Hinton v Donaldson* make direct reference to these issues, a number of the judges clearly took a strict approach in order to determine that the legislation showed no recognition of any rights in authors beyond its own terms.<sup>72</sup> A further point of significance in the *Hinton* opinions can be more readily identified as a result of our earlier discussion of the real right of property—outright ownership—and the different real right of exclusive privilege. Several of the judges referred to the distinction in denying the existence of rights of literary property beyond the statutory privileges.<sup>73</sup> A final important feature of the opinions, however, is that most of the judges were careful to distinguish between unpublished and published books. With the former, they were much more ready to recognize the existence of a general property right.<sup>74</sup>

## 6. UNPUBLISHED WORKS

The questions raised in *Hinton v Donaldson* about unpublished works quickly became a matter for decision in the Court of Session in relation to the rather special problem of private correspondence.<sup>75</sup> In *Dodsley v MacFarquhar*<sup>76</sup> in 1775, letters written by the Earl of Chesterfield to his son were, after the death of the two men, sold by the son's widow to a London publisher (Dodsley) who published them with the consent of the Earl's executors. Prior to giving that consent, however, the executors had obtained from the Lord Chancellor in England an injunction against publication. The book was registered in Stationers Hall. Dodsley's complaint in the Court of Session was that several Edinburgh booksellers, including Colin MacFarquhar as well as, inevitably, Alexander Donaldson, had without authority imported copies from England and also published reprints. Several copies of the printed pleadings survive, and one bears handwritten notes of the court's opinions.<sup>77</sup> The publishers, who also produced an opinion in their favour by John Dunning of the Middle Temple, 'one of the ablest barristers of the time',<sup>78</sup> were held entitled to an interdict. The court rejected contrary arguments that the Statute of Anne conferred no express right upon an author's representatives after his death, and that neither the recipient nor his widow had such rights of property in the letters as would enable them to publish. While the son and then the

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<sup>71</sup> *ibid* bk I, tit 1, s 55.

<sup>72</sup> MacQueen, 'War of the Booksellers' (n 7) 248.

<sup>73</sup> *ibid* 250–51.

<sup>74</sup> *ibid* 252.

<sup>75</sup> For insightful discussion of contemporary social attitudes towards personal correspondence see Katrina Williamson, 'The Emergence of Privacy: Letters, Journals and Domestic Writing' in Ian Brown, Thomas Clancy, Susan Manning and Murray Pittock (eds), *The Edinburgh History of Scottish Literature: Enlightenment, Britain and Empire (1707–1918)* (EUP 2006).

<sup>76</sup> (1775) Mor 8308; more fully at *ibid*, Literary Property, Appendix, 1. The case received extensive coverage in contemporary English as well as Scottish newspapers, information for which I am grateful to Tomás Gómez-Arostegui (personal communication on file with me).

<sup>77</sup> ALSP Campbell Collection vol 76, no 8; SLSP vols 166, no 7 and 347, no 2 (the last having the MS notes of the judges' opinions).

<sup>78</sup> ADM Forte, 'Opinions by "Eminent English Counsel": Their Use in Insurance Cases before the Court of Session in the Late Eighteenth and Early Nineteenth Centuries' (1995) *Jur Rev* 345, 360. On the practice of obtaining English counsel's opinions for use in Scottish cases at this time see further MacQueen, 'War of the Booksellers' (n 7) 244.



widow might own the manuscripts, a prohibition of publication was at least implied; and some of the letters expressly stated that they should remain secret. With regard to this latter point, the court seems to have accepted the counter-argument that it was for the sender's representatives to take the point about obligations of secrecy, not those who sought to give the material further public circulation. But the court did not rely upon any notion that the sender retained a right of property in the letters, whether in reference to the original manuscripts or their content. An appeal to the House of Lords was contemplated but eventually not pursued.<sup>79</sup>

*Dodsley v MacFarquhar* seems to have been relatively little noticed at first, being only briefly reported in Lord Woodhouselee's supplementary volumes (published in 1797) to Kames' *Folio Dictionary*, from whence it was copied into the collection of reports known as Morison's *Dictionary* published between 1801 and 1804.<sup>80</sup> The much fuller report produced in the 'Literary Property' appendix to Morison's *Dictionary* published in 1808 was presumably the result of the research on the case carried out for the next major case, *Cadell and Davies v Stewart*, decided in 1804.<sup>81</sup> Six years after the death of the poet Robert Burns in 1796, a Glasgow publisher projected the publication of a volume of his letters to Agnes McLehose, a close friend whom he addressed as 'Clarinda' (dubbing himself 'Sylvander'). Clarinda, the publisher claimed, consented to the publication.<sup>82</sup> London and Edinburgh booksellers who had acquired rights to all Burns' works and also had the concurrence of the Burns family successfully sought interdict to stop the publication. Their argument, put forward by George Joseph Bell advocate, and based on English authorities such as *Pope v Curl*<sup>83</sup> and *Duke of Queensberry v Shebbeare*,<sup>84</sup> was that an addressee such as Clarinda acquired only a limited property right in a letter, with no right to use it in any other way than as manuscript. No reconciliation was attempted between this limited property right and the traditional Scots law view of ownership as the most absolute of all rights, capable of being vested in only one person at a time except in the case of co-ownership where property is held in common by more than one person. But, crucially, the concurrence of the Burns family also enabled further arguments, based on their interest in preventing injury to Burns' character and reputation. On the other side, counsel argued that the recipient had full and unfettered property in the letters, and even if their publication was detrimental to Burns' reputation, that could not restrict the owner's, ie, Clarinda's, legal use of her property. Breach of confidence was an argument of morality, not law: 'whoever intrusts any secret, or makes any communication to another, commits himself in some measure to the discretion of his friend, and he can never hope, by means of a suspension and interdict, to prevent him from telling the secret.'<sup>85</sup>

<sup>79</sup> Parliamentary Archives, HL/PO/JO/10/3/268/10. I owe this reference to Tomás Gómez-Arostegui.

<sup>80</sup> See *Folio Dictionary* vol 3 (1797) 388. On Woodhouselee's contribution to the *Folio Dictionary* reports series, see David M Walker, *The Scottish Jurists* (W Green 1985) 224; and on the publication of Morison's *Dictionary* and its appendices see Kenneth Reid, 'A Note on Law Reporting' in Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland* (2 vols, OUP 2000) vol 1, liv–lxi, lvi.

<sup>81</sup> *Cadell and Davies v Stewart* (1804) Mor, Literary Property, Appendix, 13. See further ALSP, vol 52 (Hume Collection) no 6; vol 65 (Blair Collection) no 13; vol 114 (Campbell Collection) nos 2–3; and Faculty Collection February 1804–July 1804, no 166. See also Hector L MacQueen, 'Ae Fond Kiss: A Private Matter?' in Andrew Burrows, David Johnston and Reinhard Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (OUP 2013).

<sup>82</sup> Doubt as to the reality of her consent emerges from the pleadings for *Cadell and Davies* as found in the Session Papers, but the court did not need to make any findings on the matter.

<sup>83</sup> *Pope v Curl* (1741) 2 Atk 342.

<sup>84</sup> *Duke of Queensberry v Shebbeare* (1758) 2 Eden 329.

<sup>85</sup> *Cadell and Davies v Stewart* (1804) Mor, Literary Property, Appendix, 16.

The judges' opinions can be gleaned from notes taken at the time they were handed down.<sup>86</sup> The property arguments in relation to the letters on both sides were clearly rejected. The report in Morison's Dictionary correctly noted 'little difference of opinion upon the Bench' and summarized the 'ground upon which the Court seemed to pronounce the decision' as follows:

[quotation] That the communication in letters is always made under the implied confidence that they shall not be published without the consent of the writer, and that the representatives of Burns had a sufficient interest, for the vindication of his literary character, to restrain this publication.<sup>87</sup>[/quotation]

Discussing these cases alongside the English authorities in his lectures, Hume observed that 'it seems obvious that letters are written and conveyed under the implied condition of not being published without the consent of the writer, who in that respect has certainly no intention of transferring the property of what he writes'.<sup>88</sup> Bell also argued that English law was different from Scots law in denying the right to publish letters: 'In England, it is on the ground of property alone; in Scotland, on the ground chiefly of a just and expedient interference for the protection of reputation.'<sup>89</sup> The argument was reiterated in more detail in Bell's *Commentaries*:

[quotation] In Scotland, the Court of Session is held to have jurisdiction, by interdict, to protect not property merely, but reputation, and even private feelings, from outrage and invasion. . . . By the publication of such effusions, confidential, careless, unthinking of consequences, a man may be wounded in the tenderest part; his literary reputation hurt; his character traduced. It is, accordingly, the understood or implied condition of the communication, the implied limitation of the right conferred, that such communications are not to be published.<sup>90</sup>[/quotation]

In this passage, incidentally, the remedy of interdict is once more extended in scope, from the protection of property on to personality rights. Bell also noted that 'doubts seem to be entertained in England, whether letters falling into the hands of the assignees of bankrupts could be secured from publication by injunction'. 'With us,' he wrote, 'I think, there would be no such doubt.'<sup>91</sup> But Bell limited this personality right analysis to correspondence; otherwise 'unpublished compositions are property at common law; and the publication of them is an invasion of the rights of the owner'.<sup>92</sup>

The Scottish courts nonetheless maintained their refusal to extend protection beyond the Statute of Anne until 1811,<sup>93</sup> when the House of Lords in *Cadell and Davies v Robertson*, a Scottish appeal about the rights in a book of Burns' poetry not registered at Stationers Hall,

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<sup>86</sup> See MacQueen, 'Ae Fond Kiss' (n 81) 479–80, 483–85.

<sup>87</sup> *Cadell and Davies v Stewart* (1804) Mor, Literary Property, Appendix, 16.

<sup>88</sup> Hume (n 9) vol 4, 68.

<sup>89</sup> Bell, *Principles* (n 15) s 1356.

<sup>90</sup> Bell, *Commentaries* (n 14) vol 1, 111–12.

<sup>91</sup> *ibid* 112. See also *ibid* 114, for more expansive use of interdict in Scotland than would be possible with injunctions in England.

<sup>92</sup> Bell, *Principles* (n 15) s 1356.

<sup>93</sup> See *Payne and Cadell v Anderson and Robertson* (1787) Mor 8312 (where however interdict and damages were granted on the basis that the defenders had committed the wrong (*crimen falsi*) of counterfeiting the pursuers' book.

overturned the view of the Court of Session that no action was competent in such a case.<sup>94</sup> Lord Chancellor Eldon observed that the Statute was ‘uniformly administered . . . in this country’,<sup>95</sup> and cited the 1798 King’s Bench decision in *Beckford v Hood*<sup>96</sup> as deciding that unregistered authors nevertheless had exclusive rights to publish, and their publishers could obtain injunctions and damages for infringement. Eldon added:

[quotation] The judges in Scotland say truly, that they ought not to decide as the judges in England decide, unless they decide rightly and according to the law of Scotland. On the other hand, we may say, that if the judges in Scotland have not decided right, they are not to be followed; and in my own view, they have misunderstood the meaning of the statute in this instance.<sup>97</sup>[/quotation]

The significance of this was a holding that the Statute simply recognized a right of authors existing antecedent to registration in Stationers Hall, which merely conferred a right to particular remedies in relation to that right. It was presumably by way of silent comment on this passage that its reporter provided as an appendix the text of the judicial opinions in *Hinton v Donaldson*. But that case actually also recognized a pre-publication right in authors, without defining what happened to it upon publication, still less the effect of non-registration thereafter. The decision in the *Robertson* case was thus not utterly irreconcilable with *Hinton*, and Bell’s general view not without Scottish authority either.

#### [a] 7. TO THE COPYRIGHT ACT 1911

There is little to say about how the Scottish courts handled statutory copyright in the remainder of the nineteenth century. They accepted that the right was not dependent upon the literary or artistic quality or aesthetic merit of a work. In *Alexander v Mackenzie*,<sup>98</sup> for example, copyright was held to exist in a collection of conveyancing styles, while similar decisions were reached with regard to a list of imports and exports called the ‘Clyde Bill of Entry’,<sup>99</sup> a trade price list,<sup>100</sup> and a railway timetable.<sup>101</sup> The extension of the copyright term by the Copyright Act 1842 came just in time to preserve the copyright in the works of Sir Walter Scott which would be successfully defended in *Black v Murray* in 1870, a year prior to an exhibition marking the centenary of Scott’s birth.<sup>102</sup>

The limited case law of the period on unpublished works and correspondence tended to bear out Bell’s distinction between an author’s right of property in an unpublished work and a letter-writer’s entitlement to control publication to protect reputation. An 1855 jury case held the writer of a letter to a newspaper editor for publication entitled to withdraw it before publication, albeit without reference to Bell.<sup>103</sup> In 1881 the Court of Session

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<sup>94</sup> *Cadell and Davies v Robertson* (1811) 5 Pat 453. The reversed Court of Session decision is at (1804) Mor, Literary Property, Appendix, 16. For the pleadings in the Court Session, see ALSP, vol 52 (Hume Collection), no 5 (also with MS notes of the judicial opinions). Note that Bell was counsel for the pursuers in the Court of Session.

<sup>95</sup> (1811) 5 Pat at 504.

<sup>96</sup> *Beckford v Hood* (1798) 7 D & E 620.

<sup>97</sup> (1811) 5 Pat at 504.

<sup>98</sup> (1847) 9 D 748.

<sup>99</sup> *Maclean v Moody* (1858) 20 D 1154.

<sup>100</sup> *Harpers v Barry Henry* (1892) 20 R 133.

<sup>101</sup> *Leslie v Young* (1893) 21 R (HL) 57.

<sup>102</sup> Catherine Seville, *Literary Copyright Reform in Early Victorian England* (CUP 1999) 194–95; *Black v Murray* (1870) 9 M 341.

<sup>103</sup> *Davis v Miller and Fairly* (1855) 17 D 1166.



discharged an interdict against publication of personal correspondence (while noting that there might be a remedy after publication if injury was caused thereby); but the judges, although thinking the rules the same in England and Scotland, cited Bell and were clear that there was no property, literary or otherwise, in the letters.<sup>104</sup> Four years later, however, in the great case of *Caird v Sime*,<sup>105</sup> which concerned the unauthorized publication of the lecture notes of the Professor of Moral Philosophy at Glasgow University, the judges of the Whole Court of Session were virtually unanimous in declaring that the author of an unpublished work had a right of property in his work, citing mainly English authorities on the matter. This view was upheld in the House of Lords, where the leading speech was given by the Scottish Law Lord, Watson.<sup>106</sup> All were clear, however, that this property right was not copyright, and that it ceased upon publication. The Copyright Act 1911 swept any lingering debate away with its abolition of the requirement of registration at Stationers Hall and its inclusion of unpublished works in general within the copyright umbrella.

## [a] 8. CONCLUSION: WORK TO BE DONE

The account just given of the post-1707 history of copyright in Scotland draws heavily on recently published detailed research on the leading cases of *Hinton v Donaldson* and *Cadell and Davies v Stewart*.<sup>107</sup> Similar research is under way upon other such cases, notably *Dodsley v MacFarquhar* and *Cadell and Davies v Robertson*. All these cases were however already relatively well known because they appear in the printed law reports. The research has incidentally shown that the mid-eighteenth century saw many other, not necessarily reported, cases on the subject, suggesting that deeper research in unpublished court records and archives will be well worthwhile.<sup>108</sup> Litigation however shows us only literary property issues in dispute; it tells us much less about the law as the basis for arrangements between authors and their publishers. The subject has been touched upon from time to time in histories of publishing,<sup>109</sup> and also in the biographies of notable authors such as the philosopher David Hume (uncle of the law professor cited several times in this chapter) and the poet and novelist Sir Walter Scott.<sup>110</sup> No doubt, therefore, much more can be learned from further investigation in publishers' archives and collections of authors' private papers, not to mention evidence about readership of what authors and publishers actually produced.<sup>111</sup> Study to date seems also to be dominated by the book, with the publication of personal correspondence emerging as a further important issue in the latter part of the eighteenth century. But little, if anything, has been said about music, art and drama, despite a distinctive and thriving Scottish culture in

<sup>104</sup> *White v Dickson* (1881) 8 R 896.

<sup>105</sup> *Caird v Sime* (1885) 13 R 23.

<sup>106</sup> *Caird v Sime* (1887) 14 R (HL) 37.

<sup>107</sup> See above notes 5, 7, 81. See further for an account highlighting the patriotic dimension of the story, Warren McDougall, 'Copyright and Scottishness' in Stephen Brown and Warren McDougall (eds), *The Edinburgh History of the Book in Scotland volume 2: Enlightenment and Expansion 1707–1800* (EUP 2012) 23.

<sup>108</sup> See eg, notes 44, 45, 58 and 60 above. A good starting point for further work is the 'Literary Property' section and appendix in Morison's Dictionary, accessible via the Scottish Legal History section of Hein Online. The indexes to the Session Papers in the Advocates and especially the Signet Libraries, Edinburgh, provide the next port of call. The Signet indexes are available online: [search.archive.org](http://search.archive.org) for the author 'WSSociety'.

<sup>109</sup> See eg, Stephen Brown and Warren McDougall (n 107); Bill Bell (ed), *The Edinburgh History of the Book in Scotland vol 3: Ambition and Industry 1800–1880* (EUP 2007).

<sup>110</sup> See eg EC Mossner, *The Life of David Hume* (2nd edn, Clarendon Press 1980) 312–16; Jane Millgate, *Scott's Last Edition: A Study in Publishing History* (EUP 1987).

<sup>111</sup> See Mark R M Townsley, *Reading the Scottish Enlightenment: Books and their Readers in Provincial Scotland, 1750–1820* (Brill 2010); Vivienne Dunstan, 'Book Ownership in late Eighteenth-century Scotland: a Local Case Study of Dumfriesshire Inventories' (2012) 91 *Scottish Historical Review* 265.

all these domains in the nineteenth as well as the eighteenth centuries.<sup>112</sup> For the nineteenth century in general, perhaps, the story to be told will be one of a Scotland increasingly embedded in a United Kingdom and indeed imperial world, but the study of which is capable nevertheless of tempering undue Anglo-centricity in British copyright history.

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<sup>112</sup> For useful introductions to these fields, see Duncan MacMillan, *Scottish Art 1460–2000* (Mainstream 2000); Miles Glendinning, Ranald MacInnes and Aonghas MacKechie, *A History of Scottish Architecture: From the Renaissance to the Present Day* (EUP 2002); Sara Stevenson and A D Morrison-Low, *Scottish Photography: The First Thirty Years* (National Museums Scotland 2015); John Purser, *Scotland's Music: A History of the Traditional and Classical Music of Scotland from Early Times to the Present Day* (Mainstream 2007); Ian Brown (ed), *The Edinburgh Companion to Scottish Drama* (EUP 2011).